IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Phillip S. Figa

Civil Action No. 04-F-0212 (CBS)

JEFFERY HORTON, individually and behalf of all persons similarly situated,

Plaintiff,

v.

LEADING EDGE MARKETING INC., a British Columbia corporation,
LEADING EDGE MARKETING INC., a Bahamas corporation,
LEADING EDGE MARKETING LTD., a Cyprus company,
LEADING EDGE MARKETING INC., a dissolved Colorado corporation,
UNIPAY PROCESSING, LTD., a Cyprus company,
GEOFFREY M. MACKAY,
DM CONTACT MANAGEMENT LTD., a British Columbia corporation,
ANDREW A. MACKAY,
DOUGLAS R. MACKAY,
TECHNIPAK, L.L.C., a Colorado limited liability company,
MARK D. SCHEIDT,
ADVANCED BOTANICALS, LTD., a British Columbia corporation,
MATTHEW CLAYTON,
WARREN S. BRANDER,
JOHN DOES 1-20, whose true names are unknown,
Defendants.

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## ORDER ON PENDING MOTIONS

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THIS MATTER is before the Court on the following motions: Motions to Dismiss (Dkt. # 155), for Summary Judgment (Dkt. # 157) and to Strike Class Allegations (Dkt. # 156) of Leading Edge Marketing Inc. (of British Columbia), Leading Edge Marketing Inc. (of the Bahamas), Leading Edge Marketing Ltd. (of Cyprus), Leading Edge Marketing Inc. (formerly of Colorado), Unipay Processing, Ltd., [illegible] Management Ltd., Andrew A. MacKay and Douglas R. MacKay (the "Leading Edge Defendants"); Motion to Dismiss (Dkt. # 159) of Advanced Botanicals, Ltd., Matthew D.

Clayton and Warren S Brander (the "Advanced Botanicals Defendants"); Motion to Dismiss (Dkt. # 162) of TechniPak, LLC and Mark D. Scheidt (the "TechniPak Defendants") and Motions for Partial Summary Judgment (Dkt. # 186) and to Certify Class (Dkt. #168) of Plaintiff Jeffery Horton.

## I. FACTS AND PROCEDURAL HISTORY

The posture of this case has not changed significantly since set forth in the Court's December 14, 2004 Order on Plaintiff's Motion for a Preliminary Injunction.

## II. MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Defendants' pending motions to dismiss and for summary judgment first seek dismissal of the two claims Mr. Horton advances under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, and the three claims he advances under the Colorado Organized Crime Control Act ("COCCA"), C.R.S. §§ 18-1-101 *et seq.* Defendants contend that reasonable reliance is a *prima facie* element of the RICO and COCCA claims, and because Mr. Horton has not adequately pled or proven such reliance on his part in purchasing and using VigRx for Men Penis Enhancement ("VigRx"), the five claims arising under these statutes must fail.

Defendants also seek dismissal of the RICO and COCCA claims because Mr. Horton did not avail himself of a contractual remedy for resolving those claims, namely seeking a refund for the purchase price of VigRx under the Leading Edge Defendants' money-back guarantee. Without Mr. Horton doing so, defendants contend that he cannot prove cognizable injuries other than emotional distress.

Finally, defendants argue that the Court should dismiss the remaining state law claims Mr. Horton brings pursuant to the Colorado Consumer Protection Act ("CCPA"), C.R.S. §§ 6-1-101 *et seq.* and the California Unfair Competitive Law ("UCL"), Cal. Bus. & Prof. Code § 17200 and § 17500. They contend that the Court should dismiss the CCPA claim because Colorado does not have a significant relationship to the alleged illegal acts, and should decline to exercise jurisdiction over the remaining state law claims arising under the UCL.

Mr. Horton responds to these arguments in a 61-page opposition brief, then offers his own motion for partial summary judgment on his claims arising under the UCL. In his opposition, Mr. Horton notably appears to confess his CCPA claim. *See* Plaintiff's Consolidated Memorandum of Law in Opposition to the Defendants' Motions to Dismiss the Second Amended Complaint or for Summary Judgment at 2, n.2. Based on this confession, the Court at the oral argument on May 25, 2005, dismissed Mr. Horton's CCPA claim. As to the UCL claims, Mr. Horton contends that there is no genuine issue of material fact that the Leading Edge Defendants' marketing of VigRx violated the UCL, and seeks injunctive and restitutionary relief to remedy this violation.

**A. Standard of Review**

The Court will dismiss a claim for failure to state a claim upon which relief can be granted pursuant to F.R.Civ.P. 12(b)(6) only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is

dispositive. *See Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989). The purpose of Rule 12(b)(6) motions is to test "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994).

Unlike motions to dismiss pursuant to Rule 12(b)(6), which examine the sufficiency of a complaint alone, summary judgment is appropriate under F.R.Civ.P. 56(c) if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). When applying this standard, the Court reviews the pleadings and the documentary evidence in the light most favorable to the non-moving party. *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988). To defeat a properly supported motion for summary judgment, "there must be evidence on which the jury could reasonably find for the plaintiff." *Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1490 (10th Cir. 1995), *cert. denied*, 516 U.S. 1160 (1996), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In addition, "'where the non moving party will bear the burden of proof at trial on a dispositive issue' that party must 'go beyond the pleadings' and 'designate specific facts' so as to 'make a showing sufficient to establish the existence of an element essential to that party's case' in order to survive summary judgment." *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998), quoting *Celotex*, 477 U.S. at 322.

### B. Did Plaintiff Sufficiently Plead his RICO and COCCA Claims?

Defendants preliminarily seek dismissal of Mr. Horton's RICO and COCCA claims, contending that Mr. Horton failed to sufficiently plead the claims as required by F.R.Civ.P. 9(b). "Rule 9(b)'s purpose is to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based." *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir.), *cert. denied*, 531 U.S. 926 (2000) (internal quotation marks omitted). Toward this end, Rule 9(b) imposes particularized pleading requirements on plaintiffs alleging fraud or any claim premised on fraud. The rule provides in part: "In all averments of fraud or mistake, the circumstances constituting fraud shall be stated with particularity." As interpreted, the rule requires a plaintiff to identify the time, place and content of each allegedly fraudulent representation or omission, to identify the particular defendant responsible for it and to identify the consequences thereof. *See e.g. Lawrence Nat'l Bank v. Edmonds*, 924 F.2d 176, 180 (10th Cir. 1991).

The Court concludes that Mr. Horton has adequately met the heightened pleading standard set forth in Rule 9(b). In the Second Amended Complaint, Mr. Horton details his viewing of the description of VigRx on the Leading Edge Defendants' website and his purchase of the product. More specifically, he sets forth the time, place and contents of the false representations, the identity of the parties making the false statements (the Leading Edge Defendants) and the consequences thereof. For example, Mr. Horton alleges that "in the summer of 2003, [he] became aware of the VigRx product due to writings, signs, signals, and pictures transmitted or caused to be transmitted by means of wire communication, in particular, by transmission of all or part

of the content of the Albion Medical Website from a server located outside of the United States to Plaintiff's computer in California." Complaint at ¶ 107.. Moreover, Mr. Horton attaches to his Second Amended Complaint print-outs of the websites he visited to view VigRx and from which he purchased the product. Because these allegations are enough to put the Leading Edge Defendants on notice of the fraud claims against them, it is unnecessary for Mr. Horton to detail in his complaint the exact content of the website selling VigRx at an exact period in time

The Second Amended Complaint also adequately sets forth the involvement of the other defendants (the TechniPak and Advanced Botanicals Defendants) in the alleged scheme to defraud. It alleges "a bottle of VigRx supplied to Leading Edge by Advanced Botanicals was deposited with UPS, an interstate commercial carrier, in Colorado by Defendant TechniPak, LLC for shipment to Plaintiff in California." *Id.* at ¶ 108. Thus, Mr. Horton has adequately pled Advanced Botanicals and TechniPak Defendants as co-conspirators with the Leading Edge Defendants under RICO, 18 U.S.C. §1962(d), and COCCA, C.R.S. § 18-17-104. At the procedural juncture of a motion to dismiss, these allegations need no additional explanation, nor do they have detail the specific knowledge of these enabling defendants of the alleged scheme to defraud. Specifically, Mr. Horton alleges that Leading Edge Defendants' scheme to defraud was carried out by Advanced Botanical providing Leading Edge with the VigRx, which was then shipped to California by TechniPak. Complaint at ¶ 108. Knowledge of the fraudulent scheme has been adequately pled because under F.R.Civ.P. 9(b), for pleading purposes, "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally."

Mr. Horton's allegations regarding the product liability indemnification agreement between the Leading Edge Defendants and Advanced Botanicals and the Leading Edge Defendants' contractual release of any such claims against TechniPak alone are hardly sufficient, however, to create an inference of a conspiracy. The continuing validity of these claims beyond this procedural stage and into substantive discovery, especially regarding these defendants' state of knowledge, is in doubt.

### C. Does Plaintiff Present a Genuine Issue of Material Fact in Support of his RICO and COCCA Claims?

The provisions of RICO and COCCA relevant to Mr. Horton's claims forbid any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt, conspiring to do so, or receiving proceeds from such activity. 18 U.S.C. § 1962(a) and (c); C.R.S. § 18-17-104(3) and (4) and § 18-17-106(10). Mr. Horton has presented evidence in support of these claims, and at this stage defendants for the most part do not contest this evidence.[1]

However, defendants contend that Mr. Horton cannot not succeed on the merits of his RICO and COCCA claims because he cannot surmount two main legal hurdles. They primarily assert that to make a *prima facie* case for mail or wire fraud under RICO

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[1] The Leading Edge Defendants argue that Mr. Horton has not alleged that there existed a separate "enterprise" as defined by RICO, and that they cannot be held liable as both an enterprise and co-conspirators under RICO. The Court disagrees, and finds that there is some evidence in the record that several Leading Edge defendants and others may have been involved in a separate pattern of racketeering activity. Further, whether a separate "enterprise" exists is ordinarily a question of fact that may require jury determination. *See United States v. Sanders*, 928 F.2d 940, 943-44 (10th Cir. 1991) ("The issues of ongoing organization, continuing membership and an enterprise existing apart from the underlying pattern of racketeering are questions for the jury.").

or COCCA a plaintiff must show not just fulfillment of the above elements, but also that he or she reasonably relied upon an allegedly fraudulent statement by a defendant. In support of this proposition, defendants cite *Pelletier v. Zwiefel*, 921 F.2d 1465, 1499 (11th Cir. 1991) and *Daley's Dump Truck Serv., Inc. v. Kiewit Pacific Co.*, 759 F Supp. 1498, 1504 (W.D. Wash. 1991). Defendants argue that Mr. Horton has not presented the Court with evidence of such reliance in this case, and therefore his claims should be dismissed.

Neither RICO nor COCCA expressly requires that a plaintiff demonstrate reasonable reliance. The Tenth Circuit nor the Colorado courts have offered guidance on this issue. Federal case law interpreting RICO is instructive on issues arising under COCCA because COCCA was modeled after the federal act. *Floyd v. Coors Brewing Co.*, 952 P.2d 797, 803 (Colo. App. 1997), *rev'd on other grounds, Coors Brewing Co. v. Floyd*, 978 P.2d 663 (Colo. 1999); *Tallitsch v. Child Support Servs., Inc.*, 926 P.2d 143, 147 (Colo. App. 1996).

Several courts outside this jurisdiction have addressed the issue of whether a plaintiff is required to prove his or her reasonable reliance upon a defendant's statements to make out a claim under RICO, with mixed results. The District Court for the District of Kansas, which is within the Tenth Circuit, has articulated such a rule on numerous occasions. *See e.g. Waddell & Reed Fin., Inc. v. Torchmark Corp.*, 223 F.R.D. 566, 594-95 (D. Kan. 2004) (plaintiffs failed to show that their former parent company and its individual directors violated RICO because, among other things, plaintiffs knew true facts and therefore could not have relied on misrepresentation);

*Commander Properties Corp. v. Beech Aircraft Corp.*, 164 F.R.D 529, 539 (D. Kan. 1995) (individual reliance is a required element of a RICO claim).

Other courts have issued similar rulings. *See e.g. American Chiropractic v. Trigon Healthcare, Inc.*, 367 F.3d 212, 233 (4th Cir. 2004) (justifiable reliance essential element of RICO claim); *Bank of China v. NBM LLC*, 359 F.3d 171, 176 (2d Cir. 2004) (same); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996) (affirming dismissal of RICO fraud claim because plaintiff knew true facts and therefore could not have relied on misrepresentation).

However, Mr. Horton cites cases from other jurisdictions in which courts have held that reliance is not an element of a RICO action. *See Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002); *United HealthCare Corp. v. American Trade Ins. Co.*, 88 F.3d 563, 571 (8th Cir. 1996); *In re Synthroid Mktg. Litig.*, 188 F.R.D. 295, 300 (N.D. Ill. 1999). Mr. Horton specifically refers the Court to an extensive discussion of the reliance issue in *Sebago, Inc. v. Beazer East, Inc.*, 18 F. Supp. 2d 70, 81-5 (D. Mass. 1998). In *Sebago*, the court reviewed the contrasting reasoning between courts that require detrimental reliance as an element and courts that hold that reliance is not an element of a RICO claim. *Id.* Based on this review, the court concluded that "the line of cases that decline to read into RICO mail fraud cases a requirement of actual, detrimental reliance are most faithful to the statute and, in any event, most persuasive." *Id.* at 82.

Although neither RICO nor COCCA expressly sets forth any element of reliance by a plaintiff (reasonable or not), and the failure of the Tenth Circuit and Colorado to

offer precedential guidance on the subject, this Court need not make an independent determination of that issue. Even if detrimental reliance is found to be a requirement under RICO and COCCA, here Mr. Horton has provided the Court with adequate allegations and disputed evidence of such reliance.

Mr. Horton apparently received a recommendation for VigRx, and in response, navigated on the internet through multiple VigRx advertisements to the Leading Edge Defendants' website. On that website, he allegedly viewed photographs, descriptions and endorsements of the product. Relying upon the representations made in the advertisements and on the website, Mr. Horton claims to have purchased VigRx with every expectation that it would work as represented. In his deposition, he stated that he specifically hoped that VigRx would help him with "impotence" and "enlargement." Exhibit 1 to Plaintiff's Brief in Opposition to Motion to Strike Class Allegations at 32, 33. More specific expectations are set forth in Mr. Horton's deposition transcript.

This evidence demonstrates, at least to the point of there being a disputed fact issue, that Mr. Horton relied, either directly or indirectly, upon the representations made in advertisements and on the Leading Edge Defendants' website regarding the functioning and usefulness of VigRx. For summary judgment purposes, it cannot be said as a matter of law that he purchased the product without expectations, as defendants contend. Moreover, his alleged expectations constituted more than mere circumstantial reliance, as he suggests. They show that in purchasing VigRx, Mr. Horton avers he had specific assumptions regarding the functioning of the product (derived from alleged fraudulent representations made by the Leading Edge Defendants), and purchased the product based at least in part on these assumptions.

This is reliance, even if RICO and COCCA do not so require. As such, the Court denies summary judgment on this issue and Mr. Horton's claims brought under these statutes may advance.

### C. Does Plaintiff's Failure to Pursue a Contractual Remedy Bar his Claims?

Defendants secondarily suggest that Mr. Horton's RICO and COCCA claims must fail because he did not exercise his contractual remedy of VigRx's money-back guarantee. As a result, defendants argue that Mr. Horton did not suffer a compensable injury under either RICO or COCCA. Apparently Mr. Horton had 67 days after his purchase of VigRx on August 19, 2003 to elect to receive his money-back. He did not do so. Defendants suggest that Mr. Horton's intentional decision not to take advantage of the refund was a "self-inflicted wound" and therefore cannot create a compensable injury. This argument is without merit.

Defendants cite a number of cases in which courts dismiss claims involving refunds. *See e.g. Commercial Union Assur. Co. PLC v. Milken*, 17 F.3d 608, 612 (2d Cir. 1994); *Pevsner v. Eastern Air Lines, Inc.*, 493 F.2d 916, 917-18 (5th Cir. 1974); *Arabian American Oil Co. v. Scarfone*, 713 F. Supp. 1420, 1423 (M.D. Fla. 1989). However, none of these cases stand for the proposition that failure to exercise a right to a refund constitutes a "self-inflicted injury." In *Pevsner*, the Fifth Circuit dismissed an action because the plaintiff had not in fact been overcharged for a flight. *Id.* at 917. In *Scarfone*, the Middle District of Florida addressed the issue of whether the plaintiff in the action was the real party in interest because it had been reimbursed by a third party prior to filing suit for overcharges. *Id.* at 1421. In *Miliken*, the plaintiffs recouped their

initial investment plus 10.2 percent and thus the Second Circuit found that they could not show injury to their business or property under RICO. *Id.* at 611-13.

These cases stand in sharp contrast to the instant case where Mr. Horton has not received any compensation for his alleged injuries.[2] Furthermore, case law interpreting RICO (and in turn COCCA) does not foreclose claims brought in spite of failure to adhere to a refund policy; instead, it holds that such claims may advance because "[t]he unconditional refund offer does not ameliorate this situation . . . . It is reasonable to infer that only a small percentage of unsatisfied consumers even requested a refund, so that the defendant is able to retain many of the [fee] payments sent by customers . . . ." *United States v. Weingold*, 844 F. Supp. 1560, 1574 (D.N.J. 1994), citing *United States v. William Savran & Associates, Inc.*, 755 F. Supp. 1165, 1177 (E.D.N.Y. 1991). Indeed, much of the purpose of RICO and COCCA is to prevent and eradicate fraud, not just regulate it.

Thus, the Court will not dismiss Mr. Horton's RICO and COCCA claims for his failure to seek a refund for the purchase price of VigRx. Seeking a refund is not a prerequisite to bringing such claims, and Mr. Horton has proven that he suffered damages as a result of his purchase.

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[2] While defendants argue that Mr. Horton did not suffer monetary damages sufficient to bring a RICO or COCCA claim, the evidence suggests otherwise. Mr. Horton has shown that he suffered out-of-pocket expenses of about $50, the $40 purchase price of VigRx plus $10 shipping and handling. While the amount of damages may be minor, it is sufficient to allow his claims to move forward. *See Potomac Elec. Power Co. v. Electric Motor and Supply, Inc.*, 262 F.3d 260, 265 (4th Cir. 2001) ("If a party specifically bargains for a service, is told that the service has been performed, is charged for the service, and does not in fact receive the service, it is not appropriate for courts to inquire into whether the service 'really' had value as a precondition to finding that injury to business or property has occurred.")

### D. Should This Court Exercise Supplemental Jurisdiction Over State Law Claims?

Given that the Court has allowed Mr. Horton's federal RICO claims to proceed, it will continue to exercise supplemental jurisdiction over the remaining state law claims. *See Gullickson v. Southwest Airlines Pilots' Ass'n*, 87 F.3d 1176, 1187 (10th Cir. 1996) (whether to exercise supplemental jurisdiction lies within the discretion of the court).

### E. Are There no Genuine Issues of Material Fact on Plaintiff's UCL Claims?

Both Mr. Horton and the Leading Edge Defendants seek summary judgment on Mr. Horton's claims brought under the UCL, which prohibits "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising . . . ." Cal. Bus. & Prof. Code § 17200 *et. seq.* Mr. Horton argues that there is no genuine issue of material fact that the Leading Edge Defendants' marketing of VigRx as a product that works is false, and seeks injunctive and restitutionary relief to remedy the alleged violation. The Leading Edge Defendants respond that the marketing of VigRx is not false, as the product works as promised. They also state that Mr. Horton has not shown that he relied upon VigRx as required by the UCL.[3]

Mr. Horton states that the Leading Edge Defendants market VigRx as having "miraculous effects on the human body due to a synergistic combination of the ingredients in the precise proportions used in VigRx." Motion for Partial Summary

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[3] As it did with the RICO and COCCA claims, the Court declines to accept this argument because Mr. Horton has adequately shown reliance here. Moreover, the UCL does not appear to have any reliance requirement. Given the ongoing viability of the federal cause of action, the UCL portion of the case does not need to be stayed pending resolution of the five California appellate cases on the applicability of the UCL.

Judgment at 22. Both sides have produced substantial evidence regarding VigRx's usefulness and whether it works as promised, including multiple declarations, expert reports and scientific studies. For instance, the Leading Edge Defendants offer the endorsement of VigRx by Dr. Henry Edelson, who concludes that VigRx was effective at improving sexual function, overall greater satisfaction and the ability to maintain a large than normal erection. Leading Edge Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment at 5. In contrast, Mr. Horton offers the declaration of Dr. H.J. Bancroft, who concludes that the studies performed on VigRx in no way support the claims of increased penis size. These scientific disputes are questions for a jury, not this Court, to resolve.

The parties also make general arguments regarding VigRx's formulation, testing and ingredients and offer customer testimonials. At this stage of the proceedings, it is unclear which side is right. Given that disputes on these facts and others as to the effectiveness of VigRx exist, the Court declines to grant summary judgment on Mr. Horton's UCL claim.

## III. MOTION FOR CLASS CERTIFICATION

As addressed at the May 25, 2005 hearing, Mr. Horton seeks to serve as a representative for a worldwide putative class of approximately 300,000-400,000 individuals who purchased VigRx, and in the Second Amended Complaint asserts damages of $69 million on behalf of this alleged class ($23 million actual damages plus treble damages under COCCA). In his motion for class certification, Mr. Horton requests that the Court certify the class pursuant to F.R.Civ.P. 23.

### A. Standard of Review

A party seeking to certify a class bears the burden of proving that all the elements of F.R.Civ.P. 23 are met. *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004). The district court meanwhile, is also required to engage in its own "rigorous analysis" of whether "the prerequisites of Rule 23(a) have been satisfied." *Id.*, citing *Gen. Tel. Co. of the SW v. Falcon*, 457 U.S. 147, 161 (1982). "In doing so, the court must accept the substantive allegations of the complaint as true, although it need not blindly rely on conclusory allegations which parrot Rule 23 and may consider the legal and factual issues presented by plaintiff's complaints." *Id.* (internal citations and quotes omitted).

Rule 23(a) requires the party moving for class certification show four elements: numerosity, commonality, typicality and adequacy of the named parties to serve as class representatives. If the Court finds that these four elements are present, then it must look to the category of class action under 23(b) for additional prerequisites involving certification of the class. *Shook*, 386 F.3d at 967.

### B. Should This Case be Certified as a Class Action?

Mr. Horton argues that this case satisfies the prerequisites for class certification under F.R.Civ.P. 23(a): the class, numbering somewhere between 300,000 and 400,000, is so numerous that joinder of all members if impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and the representatives will fairly and adequately protect the interests of the class. Additionally,

Mr. Horton suggests the action is maintainable under F.R.Civ.P. 23(b)(3) because questions of law or fact common to the members of the class predominate over any questions affecting the individual members. Finally, Mr. Horton argues that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Defendants respond that Mr. Horton cannot demonstrate that issues of fact or law common to the class predominate over any questions applying only to individual members under Rule 23(b)(3), including reliance and injury, and thus class certification is not appropriate. However, as the Court has ruled, Mr. Horton has produced evidence that he generally relied upon defendants' allegedly fraudulent statements in purchasing VigRx. Given the nature of the representations and the product itself, this is likely the case with most individual VigRx purchasers and putative class members. It has also been found that Mr. Horton has shown injury to property under RICO by demonstrating that he paid approximately $59 for the VigRx. Again, this is probably true of most potential class members. These findings tend to show that Mr. Horton, and the putative plaintiff class, would be able to prove injury by offering proof of purchase of VigRx during the relevant period.

There is also a serious question as to whether the numerosity requirement of Rule 23(a) has been fulfilled such that class certification is appropriate here. Throughout the history of this case, the Court has been troubled with the issue of whether a significant number of class members are actually aggrieved to the point that they wish to seek redress. That raises the question of whether members of the class are indeed so "numerous that joinder of all members is impracticable" as required by

F.R.Civ.P. 23(a)(1). As stated at p. 8 of the Court's December 14, 2004 Order on Plaintiff's Motion for Preliminary Injunction, "the fact that the one named plaintiff who purchased VigRx was unsatisfied with its results does not at this juncture establish a level of class-based damages warranting the injunction sought." Indeed, there is a strong possibility, if not likelihood, that many members of the putative class would object to being identified as class members. *See* F.R.Civ.P. 23(b)(3)(A) (the interest of members of the class in individually controlling the prosecution or defense of separate actions is a factor to consider in maintaining an action as a class action). Mr. Horton has not yet conclusively shown otherwise.

Because of this concern, at this time the Court hesitates to certify a putative class unconditionally. Instead, it will allow the conditional certification of a class pursuant to F.R.Civ.P. 23.[4] *See Paton v. New Mexico Highlands Univ.*, 275 F.3d 1274, 1277, 1280 (10th Cir. 2002) (recognizing the authority of the district court to conditionally certify class); *Hellerstein v. Mr. Steak, Inc.*, 531 F.2d 470, 474 (10 th Cir.), *cert. denied*, 429 U.S. 823 (1976) (class action status may be conditional and may be altered or changed before a decision on the merits). Mr. Horton has demonstrated that he is a representative that will fairly and adequately protect the interests of the class, and plaintiffs' counsel have shown that they will fairly and adequately pursue these interests. The extent to which this action ultimately will fulfill the requirements of Rule 23 and the UCL should be determined through limited class action notification as

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[4] The Court believes that Mr. Horton has satisfied conditionally the requirements not only of Rule 23, but also the revised California law setting forth requirements for bringing class actions under the UCL.

ordered at the conclusion of the May 25, 2005 hearing.

Given that there is also a substantial concern with invading the privacy of potential class members, plaintiffs' counsel shall offer class notice through publication alone, rather than sending notice to each individual class member. No discovery of the identity of any members of the class will be allowed. At no time shall plaintiffs' counsel initiate contact any potential class member, unless counsel has been contacted by that particular member first.

Publication may be made in any publication and on the internet, although not on websites owned or controlled by any defendant. The deadline for filing the results of the publication efforts, along with a statement of position on behalf of the plaintiff class as to the numerosity requirement, shall be September 2, 2005. Within 14 days thereafter, or by September 16, 2005, defendants shall file a response to plaintiff's statement of position and indicate what class discovery, if any, they require and any motion to decertify the class. A hearing on these matters is scheduled for Friday, September 30, 2005 at 1:30 p.m.

At that time, the Court will revisit the conditional class certification to determine whether this action should continue as a class action or be decertified as appropriate. This decision is dependent largely upon Mr. Horton and plaintiffs' counsel presenting the Court with an adequate number of aggrieved class members seeking redress.

The Court thus certifies conditionally a class consisting of all consumers who purchased VigRx from the Leading Edge Defendants after February 5, 2000. The Court also certifies conditionally a subclass consisting of all persons who purchased VigRx while residing in California from the Leading Edge Defendants after February 5,

2000.

## IV. CONCLUSION

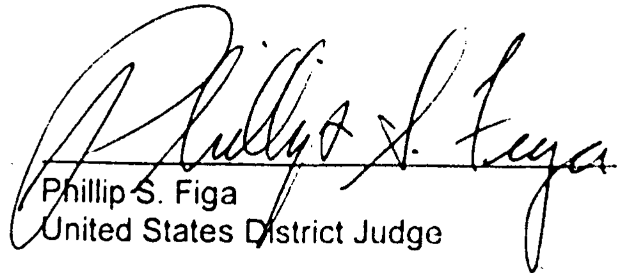
For the reasons stated above, the Court DENIES the Motions to Dismiss (Dkt. # 155), for Summary Judgment (Dkt. # 157) and to Strike Class Allegations (Dkt. # 156) of the Leading Edge Defendants; DENIES the Motion to Dismiss (Dkt. # 159) of Advanced Botanicals, Ltd.; DENIES the Motion to Dismiss (Dkt. # 162) of TechnikPak, LLC and Mark D. Scheidt; DENIES the Motion for Partial Summary Judgment of Mr. Horton (Dkt. # 186) and GRANTS CONDITIONALLY the Motion to Certify Class (Dkt. #168) of Mr. Horton. Plaintiff's claim arising under the Colorado Consumer Protection is hereby dismissed. There shall be no additional filings made under seal, and all previously sealed filings and documents will be unsealed on June 8, 2005.

The Court certifies conditionally a class consisting of all consumers who purchased VigRx from the Leading Edge Defendants after February 5, 2000 and a subclass consisting of all persons who purchased VigRx while residing in California from the Leading Edge Defendants after February 5, 2000. The Magistrate Judge is hereby referred all matters related to class notice and/or publication, and he will approve any notice pursuant to F.R.Civ.P. 23(c)(2)(B). The Magistrate Judge remains authorized to determine the timing and scope of discovery. Notification of the class claims, by publication only, shall be completed by September 2, 2005, and plaintiffs shall file with the Court a brief regarding the results of that notification on that date. Defendants' response and any motions to decertify the class shall be filed by September 16, 2005. A hearing on class certification is hereby scheduled for **Friday,**

**September 30, 2005 at 1:30 p.m.**, at which time the Court will determine whether this action should proceed as a class action or be decertified.

DATED: May 27, 2005

BY THE COURT:



Phillip S. Figa
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**CERTIFICATE OF SERVICE**

Case No. 04-F-212 (CBS)

The undersigned certifies that a copy of the foregoing **Order on Pending Motions** was served on May 21, 2005, by:

(X) delivery to:

Magistrate Judge Craig B. Shaffer

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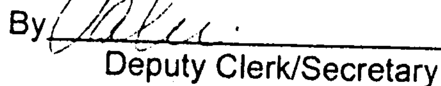
By 
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